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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

KRISTIE PAGAN, ESTHER ALEXANDER, BRIDGETT HERRERA, VELICIA MATA, and ASHLEY SULLIVAN, individually and as parents and natural guardians of their minor children and on behalf of all others similarly situated,

Plaintiffs,

2:10-cv-04676-ADS-WDW

- against -

ABBOTT LABORATORIES, INC.,

Defendant.

- x

DEFENDANT ABBOTT LABORATORIES, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE PLAINTIFFS' REPLY REGARDING CLASS CERTIFICATION, OR IN THE ALTERNATIVE, FOR LEAVE TO FILE A SUR-REPLY

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Defendant Abbott Laboratories, Inc. ("Abbott") respectfully submits this memorandum of law in support of its motion to strike certain portions of, and exhibits to, Plaintiffs' reply memorandum in support of class certification (Dkt. No. 57), or in the alternative, for leave to file the attached sur-reply in opposition to class certification.

PRELIMINARY STATEMENT

On March 23, 2012, Plaintiffs filed a bare-bones motion for class certification. Its sole exhibit, and the only document specifically cited therein, was Plaintiffs' unverified complaint. (Plaintiffs did include a generic reference, in a footnote – which the Court's individual rules prohibit – to all documents "previously submitted" in this case (Dkt. No. 49-1 at 2 n.1), although Plaintiffs did not cite any *particular* documents or explain how they supported certification.) Plaintiffs proclaimed that Rule 23's requirements were met, but despite a full year of class-certification discovery, Plaintiffs marshaled *no evidence* in support of that claim.

In Abbott's opposition, it explained that Rule 23 "does not set forth a mere pleading standard" and that a party seeking certification "must affirmatively demonstrate" that each of Rule 23's requirements is met with "evidence" – i.e., "affidavits, documents, or testimony." (Dkt. No. 56 at 10 (citations omitted).)

Realizing their error, Plaintiffs have filed a reply memorandum filled with new factual assertions (most of which lack any citations to the record) and accompanied by ten exhibits not cited in their opening brief. Furthermore, continuing a pattern of "problematic" conduct, *see Leonard v. Abbott Labs., Inc.*, No. 10-CV-4676(ADS)(WDW), 2012 WL 764199, at *8-*9 (E.D.N.Y. Mar. 5, 2012), Plaintiffs fail to inform the Court of undisputed evidence directly contradicting certain of their new allegations.

It is well-settled that a moving party may not raise new arguments, assert new claims, or adduce new evidence for the first time on reply. Abbott therefore moves to strike the offending portions of Plaintiffs' submission. In the alternative, Abbott seeks leave to file the accompanying sur-reply to address Plaintiffs' new arguments and evidence.

ARGUMENT

"[I]t is established beyond peradventure that it is improper to sandbag one's opponent by raising new matter in [a] reply." *Wolters Kluwer Fin. Servs. Inc. v. Scivantage*, No. 07 CV 2352(HB), 2007 WL 1098714, at *1 (S.D.N.Y. Apr. 16, 2007); *see also Grand River Enters. Six Nations, Ltd. v. King*, No. 02 Civ. 5068(JFK), 2012 WL 263100, at *7 (S.D.N.Y. Jan. 30, 2012) ("The Court does not countenance Plaintiff's efforts to sandbag [defendants] with last minute documents when [they] have no opportunity to respond."); *Fisher v. Kanas*, 487 F. Supp. 270, 278 (E.D.N.Y. 2007) (Spatt, J.) (noting that "rais[ing] a new issue in [a] reply brief is improper practice"). This principle applies with equal force to new legal arguments, new factual assertions, and new documentary evidence. *See, e.g.*, *Florez v. United States*, No. 07-CV-4965, 2009 WL 2228121, at *8 n.13 (E.D.N.Y. July 24, 2009); *Wolters Kluwer*, 2007 WL 1098714, at *1; *Fisher*, 487 F. Supp. at 278; *Rothberg v. Chloe Foods Corp.*, No. CV-06-5712 (CPS), 2007 WL 2128376, at *17 n.73 (E.D.N.Y. July 25, 2007); *Matera v. Native Eyewear, Inc.*, 355 F. Supp. 2d 680, 682-83 (E.D.N.Y. 2005) (Spatt, J.).

There is a limited exception for new evidence "submitted in response to . . . new issues raised by [the nonmovant] in their opposition brief." *New Look Party Ltd. v. Louise Paris Ltd.*, No. 11 Civ. 6433(NRB), 2012 WL 251976, at *4 n.4 (S.D.N.Y. Jan. 11, 2012). But where the new matter "goes to the heart of [the movant's] contention," it "should [be] submitted with [the movant's] opening brief in order to give [the nonmovant] an appropriate opportunity to respond." *Id.*; *see also Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc.*, 687 F. Supp. 2d 381, 387

(S.D.N.Y. 2010) ("It is plainly improper to submit on reply evidentiary information that was available to the moving party at the time that it filed its motion and that is necessary in order for that party to meet its burden."). "Providing specifics in a reply in support of a general argument in an [opening brief] counts as [improper] new matter in reply." *Wolters Kluwer*, 2007 WL 1098714, at *1 (quoting *Murphy v. Vill. of Hoffman Estates*, No. 95 C 5192, 1999 WL 160305, at *2 (N.D. Ill. Mar. 17, 1999)); *see also Murphy*, 1999 WL 160305, at *2 ("Raising an argument generally in a motion . . . does not give a litigant license to be vague in his original submissions and provide the necessary detail in his reply.").

When a movant improperly presents new matter on reply, "[t]ypically, . . . the Court strikes the [new matter], and does not consider it for purposes of ruling on the motion." *Wolters Kluwer*, 2007 WL 1098714, at *1 (citations omitted); *see also Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Ed.*, 444 F.3d 158, 169 (2d Cir. 2006) (granting motion to strike portion of reply brief raising new argument). At minimum, the court should allow the nonmovant an opportunity to respond. *See, e.g.*, *Vargas v. United States*, 819 F. Supp. 2d 366, 374 (S.D.N.Y. 2011) (permitting sur-reply in light of new matter introduced on reply); *Guerrero v. United States*, No. 08 Civ. 2880(LTS), 2011 WL 1560829, at *2 (S.D.N.Y. Apr. 201, 2011) (same); *Revise Clothing*, 687 F. Supp. 2d at 387 (same).

In this case, Plaintiffs' opening memorandum relied entirely on the Second Amended Complaint and cited no competent evidence. Plaintiffs attempt to cure that deficiency on reply by submitting ten new documentary exhibits:

- a press release about a different Abbott division's settlement with the Department of Justice in a separate matter (Exhibit A);
- an incomplete version of Abbott's post-recall product-testing results, generated in the midst of that investigation (Exhibit B);
- the United States Food and Drug Administration's ("FDA") Form 483 report

listing its post-recall "inspectional observations" (Exhibit C);

- an incomplete post-recall document showing the locations where fumigation effectiveness checks would later be carried out (Exhibit D);
- an EcoLab insect-trap activity report for the third quarter of 2010 (Exhibit E);
- new excerpts from the depositions of Matthew Painter and Diane Beno (Exhibit F and I);
- two documents describing post-recall remedial changes to, *inter alia*, Abbott's Standard Operating Procedures (Exhibits G-H);
- Abbott's responses to Plaintiffs' Second Set of Interrogatories (Exhibit J).

Plaintiffs' reply memorandum also includes new factual assertions not advanced in their opening brief. Most are unsupported by any citation to the record, and several are seriously misleading or demonstrably untrue (as Abbott explains in the proposed sur-reply attached hereto). To name just a few:

- "Despite FDA requests therefor, ABBOTT failed to turn over EcoLab [p]est control audits for the period April 23, 2010 through September 16, 2010." (Reply Mem. at 3 (citing Exhibit C, *which states no such thing*));
- "Statistically, if all recalled units had been tested, a projected 44.5 million units manufactured from January 2007 to September 22, 2010, would have tested positive for adult beetle and larvae content." (*Id.* at 2) (no citation to record);
- "ABBOTT did not evaluate the degree of contamination of any powdered formula produced from January 2007 to July 16, 2010." (*Id.*) (no citation to record);
- "At the Sturgis facility, prior to the recall, Standard Operating Procedures ('SOP') for Pest and Rodent Control were either non-existent or woefully deficient." (*Id.* at 4-5);
- "**182,092** end-consumer recall-notification letters were mailed between September 25, 2010 and November 30, 2010, to residential addresses in the state of New York and **16,893** end-consumer recall-notification letters were mailed between September 25, 2010 and November30 [sic], 2010, to residential addresses in the state of New Hampshire." (*Id.* at 6);
- "Except for 100K 'random' units, ABBOTT has obtained judicial approval and destroyed all affected pre-recall manufactured Similac product." (*Id.* at 3.)

None of these new factual allegations is offered "in response to . . . *new issues* raised by [Abbott] in [its] opposition brief." *New Look*, 2012 WL 251976, at *4 n.4 (emphasis added). Instead, these allegations "go[] to the heart of" Plaintiffs' affirmative case for class certification. *Id.*; *see also Revise Clothing*, 687 F. Supp. 2d at 387. And with one exception, these alleged facts were "available to [Plaintiffs] at the time [they] filed" their opening brief. *Id.* The exception is the figures Plaintiffs cite regarding the number of recall-notification letters mailed. These figures are taken from Abbott's responses to Plaintiffs' Second Set of Interrogatories, which Plaintiffs did not even propound until the day before they moved for class certification. Thus, while these figures may not have been "available to [Plaintiffs] at the time [they] filed [their] motion," that is only because Plaintiffs did not ask for them during the preceding year of class discovery.

Finally, realizing that it does not constitute a cognizable injury, Plaintiffs apparently abandon their opening memorandum's unambiguous declaration that "[b]ut for ABBOTT's deceptive business practices and misrepresentations, Plaintiffs and putative members of the class *would have purchased competitors' . . . infant formulae*" rather than Similac. (Dkt. No. 49-1 at 5 (emphasis added).) Instead, Plaintiffs now seem to argue that, because of purported Abbott misrepresentations, each putative class member "paid a higher price for [Similac] than [they] otherwise would have." (Reply Mem. at 8.) Curiously, just five pages later, Plaintiffs insist that "ABBOTT *did not* make any affirmative deceptive statement . . . ." (*Id.* at 13 (emphasis added).) Regardless, Plaintiffs never previously alleged that they, or the rest of the putative class, would have proceeded with their Similac purchases, *but for a lesser price*, had Abbott publicly announced that a small number of Similac units might contain beetles. Plaintiffs may not modify their theory of injury at this late date.

CONCLUSION

For the reasons set forth above, Abbott respectfully requests that the Court strike the aforementioned portions of, and exhibits to, Plaintiffs' reply memorandum. In the alternative, Abbott requests leave to file the sur-reply memorandum attached hereto.

June 5, 2012

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